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No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LESLIE N. BEDELL, an Individual and
BLUE WATER MARINE CATERING, INC.,
a Corporation,
Petitioners,

v.

LYNN MARTIN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Fair Labor Standards Act contains an exclusion whereby the "sales" of an "establishment" that is considered a "mom and pop" establishment "shall not be included for the purposes of determining the annual gross volume of sales of any enterprise." Do the words used by Congress in creating this "mom and pop" exclusion require that the gross volume of sales made by a "mom and pop" establishment not count toward determining the annual gross volume of sales of an entire enterprise where the services to be performed pursuant to the sales contracts are performed at remote locations by persons not employed by the "mom and pop" establishement?

2. Does a cook aboard a seagoing vessel who works subject to the direction of the master of the vessel, who performs only the duties of a cook aboard the vessel, and who is therefore normally considered a seaman under the Fair Labor Standards Act, lose seaman's status if 20 percent or more of the persons who eat the cook's meals are not themselves seamen?

PARTIES TO THE PROCEEDINGS

The Petitioners are Leslie N. Bedell, an individual, and Blue Water Marine Catering, Inc.*

The Respondent is Lynn Martin, Secretary of Labor, United States Department of Labor.

*There are no parent companies or subsidiaries of Blue Water Marine Catering, Inc.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners, Leslie N. Bedell and Blue Water Marine Catering, Inc., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on March 25, 1992, and as to which rehearing was denied on April 21, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in this matter is reported at 955 F.2d 1029 (5th Cir. 1992) and is reprinted in Appendix A hereto, at p. 1a.

The Order denying Petitioners' Petition for Rehearing is not reported. It is reprinted in Appendix C hereto at p. 21a.

The Judgment and Findings and Conclusions of the United States District Court for the Eastern District of Louisiana are not reported. They are reprinted in Appendix B hereto at p. 13a.

JURISDICTION

1. On March 25, 1992, the United States Court of Appeals for the Fifth Circuit entered the judgment sought to be reviewed by this Petition.

2. On April 21, 1992, the United States Court of Appeals for the Fifth Circuit denied Petitioners' timely Petition for Rehearing.

3. This Court has jurisdiction to entertain this Petition under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS

This is an action under the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq.* The action alleges a violation of the "maximum hours" provision of the FLSA, 29 U.S.C. § 207.

29 U.S.C. § 207(a)(1) provides:

> Except as otherwise provided in this section, no employer shall employ any of its employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 203(s)(2) provides:

> Any establishment that has as its only regular employees the owner thereof or the parent, spouse, child

or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise. The sales of such an establishment shall not be included for the purposes of determining the annual gross volume of sales of any enterprise for the purposes of this subsection.

29 U.S.C. § 213(b)(6) provides:

The provisions of Section 207 of this title shall not apply with respect to any employee employed as a seaman.

29 C.F.R. § 779.23 provides:

As used in the Act, the term "establishment," which is not specially defined therein, refers to a "distinct physical place of business" rather than to "an entire business or enterprise" which may include several separate places of business. This is consistent with the meaning of the term as it is normally used in business and in government, is judicially settled, and has been recognized in the Congress in the course of enactment of amendatory legislation (*Phillips v. Walling*, 324 U.S. 490; *Mitchell v. Bekins Van & Storage Co.*, 352 U.S. 1027, 95 Cong. Rec. 12505, 12579, 14877; H. Rept. No. 1453, 81st Cong., 1st Sess., p. 25). As appears more fully elsewhere in this part, this is the meaning of the term as used in sections 3(r), 3(s), 6(d), 7(i), 13(a), 13(b), and 14 of the Act.

29 C.F.R. § 783.31 provides:

In accordance with the legislative history and authoritative decisions as discussed in §§ 783.28 and 783.29, an employee will ordinarily be regarded as "employed as a seaman" if he performs, as master or subject to the authority, direction, and control of the master aboard a vessel, service which is rendered primarily as an aid in the operation of such vessel as a means of transportation, provided he performs no substantial amount of work of a different character. This

> is true with respect to vessels navigating inland waters as well as ocean-going and coastal vessels. (*Sternberg Dredging Co. v. Walling*, 158 F.2d 678; *Walling v. Haden*, 153 F.2d 196, certiorari denied 328 U.S. 866; *Walling v. Great Lakes Dredge & Dock Co.*, 149 F.2d 9, certiorari denied 327 U.S. 722; *Douglas v. Dixie Land and Gravel Co.* (E.D. Tenn.), 9 WH Cases 285). The Act's provisions with respect to seamen apply only when he is "employed as" such (*Walling v. Haden*, supra); it appears also from the language of section 6(b)(2) and 13(a)(14) that they are not intended to apply to any employee who is not employed on a vessel.

29 C.F.R. § 783.32 provides:

> The term "seaman" includes members of the crews such as sailors, engineers, radio operators, firemen, pursers, surgeons, cooks, and stewards if, as is the usual case, their service is of the type described in § 783.31. In some cases, it may not be of that type, in which event the special provisions relating to seamen will not be applicable (*Sternberg Dredging Co. v. Walling*, 158 F.2d 678; *Cuascut v. Standard Dredging Co.*, 94 F. Supp. 197; *Woods Lumber Co. v. Tobin*, 199 F.2d 455). However, an employee employed as a seaman does not lose his status as such simply because, as an incident to such employment, he performs some work not connected with operation of the vessel as a means of transportation, such as assisting in the loading or unloading of freight at the beginning or end of a voyage, if the amount of such work is not substantial.

STATEMENT OF THE CASE

This is an action by the Secretary of Labor alleging violations of the Fair Labor Standards Act (FLSA), upon which jurisdiction was based. The action was brought in the United States District Court for the Eastern District of Louisiana. The District Court entered judgment in favor of the Defendants-Petitioners. It held

that neither the employees in question as individuals nor the Petitioners as an enterprise was covered by the FLSA. It held that Petitioners as an enterprise were not covered because they were entitled to the FLSA's exemption for "mom and pop" businesses. The U.S. Court of Appeals for the Fifth Circuit reversed this ruling.

A. Statement Of Facts

Petitioner Blue Water Marine Catering, Inc. (Blue Water) was a Louisiana corporation. Petitioner Leslie N. Bedell was the sole owner, president, and manager of Blue Water. Bedell operated Blue Water from his home in Gretna, Louisiana. The only other people who worked with Bedell in the Gretna office were his wife and the daughter of his wife.

From the Gretna office, Bedell sold Blue Water's catering services to "jack-up boats." Jack-up boats provide offshore maintenance services (*e.g.*, welding, sandblasting, painting, and diving) for oil companies. Blue Water would supply cooks to work on the jack-up boats. Bedell was the only individual who sold Blue Water's catering services. All sales of Blue Water's services were made from the Gretna office and all payments for its services were received there.

The duties of the Blue Water cooks were limited to preparing meals, washing dishes, and related work performed strictly in the galley. They never performed any of the offshore maintenance work, such as welding, sandblasting, painting, or diving. The cooks were at all times subject to the authority, direction, and control of the captain of the vessel.

During the period of time relevant to this case, Blue Water paid the cooks whose services it supplied a day rate that was based, implicitly, on a recognition of overtime hours. It did not pay them at an hourly rate with overtime premiums. Blue Water's use of the day rate was consistent with the universal practice of the offshore

oil services industry dating back to the 1940's. The practice was based on the understanding, never questioned by the Labor Department for forty years, that the jack-up boat cooks were exempt from the FLSA as seamen, pursuant to 29 U.S.C. § 213(b). Moreover, the practice of paying the day rate operated to the economic benefit of the cooks in Blue Water's case. This became apparent when, in an attempt to avoid litigation, Blue Water abandoned the day rate. When the cooks worked less than seven straight days (which occurred frequently), they got paid less under the hourly-wage-plus-overtime practice than they would have received if paid a comparable day rate.

B. The District Court's Decision

After forty years of apparent acquiescence, the Secretary of Labor decided that the payment of the day rate violated the FLSA. It brought this action against Blue Water, a small business, in an effort to overturn the industry-wide practice. The District Court held a one-day bench trial on the issue of liability. The Court then entered judgment in favor of Blue Water. It held first that the cooks supplied by Blue Water, as individuals, were not covered by the FLSA because they did not produce goods for commerce within the meaning of 29 U.S.C. § 207. (*See* p. 16a, *infra*).

The District Court then held that Blue Water, as an enterprise, was exempt from coverage under 29 U.S.C. § 203(s), the "mom and pop" exclusion. (*See* p. 18a, *infra*). During the relevant time period,[1] this provision stated:

> Any establishment which has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of the owner shall not be considered to be an enterprise en-

[1] The 1989 amendments slightly changed the grammer and structure of the "mom and pop" provision, but made no substantive alteration.

> gaged in commerce or in the production of goods for commerce or a part of such an enterprise . . .

It further provided:

> the sales of such an establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection.

The court found that the office of Blue Water in Bedell's home was an establishment of Blue Water Marine. It further found that the only regular employees of that establishment were Bedell, his wife, and his wife's daughter. The court found that the cooks whose services Blue Water sells to the jack-up boats are not employees of the Gretna office establishment. It noted that these cooks never set foot inside the Gretna office and are paid at locations remote therefrom. (*See* p. 17a, *infra*).

The court rejected the Labor Department's contention that the Gretna office should not be considered an establishment in its own right, but rather one component of a single establishment comprised of the Gretna office plus the off-shore vessels where the cooks work. The court noted that this argument was inconsistent with the Department's own Interpretative Bulletin, 29 C.F.R. § 779.23, which provides:

> As used in the Act, the term "establishment," which is not specially defined therein, refers to a "distinct physical place of business" rather than to "an entire business or enterprise" which may include several separate places of business . . . . As appears more fully elsewhere in this part, this is the meaning of the term as used in sections 3(r), 3(s), 6(d), 7(i), 13(a), 13(b) and 14 of the Act.

(*See* p. 18a, *infra*). The court concluded that Blue Water's Gretna office was a distinct physical place of business and thus an establishment. It also concluded that the jack-up vessels where the cooks worked were separate establishments within Blue Water's enterprise. (*Id.*).

The court then found that the sales of Blue Water were sales of the Gretna office "mom and pop" establishment, since those sales were entirely generated from that establishment. The court concluded that under the "mom and pop" exclusion, 29 U.S.C. § 203(s), these sales could not be included for purposes of determining the annual gross volume of the Blue Water enterprise. Without those sales, the gross volume of Blue Water's sales did not meet the $250,000 threshold for FLSA enterprise coverage that applied during the relevant time period. Accordingly, the District Court held that Blue Water was exempt from FLSA coverage. (*See* p. 18a, *infra*).

Blue Water also argued in District Court that the cooks supplied by Blue Water were exempt from coverage as "seamen" under 29 U.S.C. § 213(b)(6). The court rejected this argument. It found that Blue Water's cooks perform work essential to the operation of the vessels on which they work. It also found that while aboard these vessels the cooks are subject to the authority, direction, and control of the master of the vessel. (*See* p. 18a, *infra*). The court held that one is employed as a seaman if one performs service which is rendered primarily as an aid in the operation of a vessel as a means of transportation. The court concluded, without giving its reasons, that the cooks in question "do not meet such requirements." (See p. 19a, *infra*).

C. The Court Of Appeals Decision

The Court of Appeals reversed the District Court's holding that Blue Water, as an enterprise, is exempt from coverage under the "mom and pop" exclusion.[2] It remanded the case so the District Court could redetermine, under the standard articulated by the Court of Appeals, whether the cooks were seamen for purposes of the FLSA.

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[2] Because the FLSA's overtime provisions apply if the employees are covered as individuals *or* if the enterprise for which they work is covered, the Court of Appeals found it unnecessary to decide whether the cooks were individually covered.

The Appeals Court held that Blue Water is not exempt under the "mom and pop" exclusion because, in its view, the income generated by the work of the cooks should be attributed to the entire enterprise, not to the Gretna office establishment. It concluded, therefore, that this income counts toward the dollar volume requirements of the FLSA. Attributing this income to Blue Water as a whole meant that the Blue Water enterprise was covered by the FLSA. (*See* pp. 8a-9a, *infra*).

The Appeals Court did not disagree with the District Court's finding that the office in Bedell's Gretna home was a distinct establishment under the FLSA. Similarly, the Court did not overturn the District Court's finding that the Gretna office had no regular employees outside of immediate family members. In fact, the Appeals Court stated that "because [the cooks] could be employees of the Blue Water enterprise without being employees of the Bedell establishment, . . . we cannot say that they are employees of Blue Water's home office." (*See* p. 7a, *infra*). The court concluded however, that if the cooks are not employees of the Gretna office establishment, then the revenues their services help bring to Blue Marine may not be attributed to the Gretna office establishment, but instead must be attributed to the overall Blue Water enterprise. (*See* p. 9a, *infra*). It stated that otherwise it would be too easy for businesses controlled by immediate family members to fall within the "mom and pop" exclusion. (*See* p. 8a, *infra*).

As to the seaman exemption, the Appeals Court, deferring to Labor Department regulations, held that, for purposes of the FLSA, a seaman is an employee, including a cook, who

> performs as master or subject to the authority, direction, and control of the master aboard a vessel, service which is rendered primarily as an aid in the operation of a vessel as a means of transportation.

(*See* p. 11a, *infra*). The court also agreed with the regulations that if a worker performs both seaman's work and

nonseaman's work, the worker is a seaman unless the nonseaman's work is substantial in amount, *i.e.*, more than 20 percent of the time worked. The court then determined that cooks render services as an aid in the operation of a vessel as a means of transportation only to the extent that they cook "for seamen." It remanded the case to the District Court for a determination of whether the cooks spend more than 20 percent of their time preparing food for individuals who are not involved in the navigation of the boat. (*See* p. 12a, *infra*).

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD CORRECT THE COURT OF APPEALS' MISREADING OF THE "MOM AND POP" EXCLUSION, WHICH WOULD RESULT IN A SEVERE RESTRICTION OF THE PROTECTIONS OF THAT PROVISION

By misreading the plain language of the "mom and pop" exclusion, the Fifth Circuit has severely restricted the important protection afforded by that provision. The "mom and pop" exclusion reflects the Congressional desire to insulate from federal intrusion, at least to a degree, the pay policies of a class of small, family-owned and operated businesses. The Fifth Circuit's ruling would limit that protection essentially to situations in which only the employees of an entire enterprise, not just of an establishment thereof, are "mom and pop" and their immediate relatives. The use of employees at completely distinct establishments to assist in producing revenue would be enough to defeat application of the exclusion.

The Fifth Circuit's ruling thus will have major consequences for small, family-owned and operated businesses. Standing alone, this fact would not necessarily merit this Court's attention. However, the Fifth Circuit's decision is based on a patent misreading of the plain language of the statute. Moreover, the Fifth Circuit appears to have misread the statute precisely in order to prevent the

"mom and pop" exclusion from encompassing more than a very few situations. This Court should intercede to prevent judicial policy-making that flouts the clear commands of Congress.

Applying the plain language of the "mom and pop" exclusion to District Court findings that were not overturned on appeal requires the conclusion that Blue Water is not covered by the FLSA. The "mom and pop" exclusion provides, in relevant part, that

> Any establishment that has as its only regular employees the owner thereof or the . . . spouse . . . or other members of the immediate family of such owner shall not be considered to be . . . a part of [an enterprise engaged in commerce]. The *sales* of such an establishment shall not be included for the purposes of determining the annual gross volume of *sales* of any enterprise for the purposes of this subsection.

29 U.S.C. § 203(s)(2) (emphasis added). The Court of Appeals did not overturn the District Court's findings that the Gretna office was an establishment whose only regular employees were the immediate family members of the owner. Similarly, it did not disturb the lower court's finding that all of Blue Water's sales are made from the Gretna office establishment. Accordingly, the plain language of the "mom and pop" exclusion dictates that the sales made by the Gretna office establishment (which constituted all sales of Blue Water) be excluded from the annual gross volume of the sales of the Blue Water enterprise. The Court of Appeals simply declined to follow the language set forth by Congress.

The Court of Appeals emphasized that the revenue (or income) Blue Water ultimately receives through the sales made by Bedell from the Gretna office is, in part, the result of services performed by the cooks at establishments other than the home office. At one point, it described the District Court's error as the attribution of "the *revenues* generated by [the cooks'] work in the

jack-up boats to [the] home office establishment." (*See* p. 8a, *infra*, emphasis added). Later, it stated that "the District Court erred by attributing the *income* earned by working on [the jack-up boat] establishments not to the Blue Water enterprise but to the one establishment in Gretna." (*See* p. 9a, *infra*, emphasis added).

In fact, however, the District Court made no findings or holdings about how to attribute "income" or "revenues" generated by the work of the cook. Instead, looking to the plain words of the statute, the District Court limited its findings and holdings to "sales." It found that all sales of Blue Water's services are generated and made from the Gretna office. It therefore held that the sales cannot be assigned elsewhere. The Court of Appeals erred by departing from the District Court's statutorily required focus on "sales" and injecting the concepts of "income" and "revenue" into a provision that does not contain those words.

As written, the "mom and pop" exclusion looks only to sales themselves, not to the goods or services that are the objects of the sales. To use the concept of the services generated by the cooks instead of the concept of the sales generated by Bedell (the only salesperson) is to violate the unambiguous statutory language. In common business practice, a sale occurs as soon as someone agrees to provide services for a certain price. The same is true under Louisiana law, which provides:

> The sale is considered to be perfect between the parties . . . as soon as there exists an agreement for the object and for the price thereof; although the object has not yet been delivered, nor the price paid.

Louisiana Civil Code Art. 2456.[3] Thus, the sales at issue in this case occurred when Bedell, from his office in Gretna,

[3] Congress has not, in the FLSA, specified the time at which a sale is considered to be perfected. Thus, the Court should look to local law to supply this missing element. *Cf. Marcus v. Director, Office of Workers' Compensation Programs*, 548 F.2d 1044, 1047 (D.C. Cir. 1976).

agreed to provide the services of cooks. Under the plain language of the "mom and pop" exclusion, those events were sales of the Gretna office establishment and could not be included for purposes of determining the annual gross sales volume of Blue Water.

The Appeals Court indicated that its attribution to the entire Blue Water enterprise of sales generated by the Gretna office was the necessary consequence of concluding that the cooks were not Gretna office employees. It believed that if the cooks work at establishments other than the Gretna office, then "the income generated by work performed at [Blue Water's] many other establishments should be attributed to the entire enterprise." (*See* p. 8a, *infra*). However, nothing in the language of the statute sunggests that there is any linkage between the questions of (1) which non-sales persons are employees of an establishment and (2) what constitutes a sale of the establishment. These are separate and distinct inquiries. It was error for the Appeals Court to have permitted its determination of the former issue to influence its determination of the latter one.

Ultimately, the Court of Appeals based its decision unabashedly on its conviction that it would be poor policy to permit the exclusion from FLSA coverage of sales made by "mom and pop" establishments where the services sold by those establishments are performed at other non-"mom and pop" establishments of the same enterprise. But this policy preference by the court does not justify judicial rewriting of the statute. If Congress had shared the court's preference, it would have described that which is excluded by the "mom and pop" provisions as "goods and services produced," or as "money generated by work performed;" it would not have used the word "sales." Absent such language, the Court of Appeals should not have found FLSA coverage in this case.

II. THIS COURT SHOULD CORRECT THE COURT OF APPEALS' ERROR IN NOT HOLDING THAT THE COOKS ARE EXEMPT AS "SEAMEN"

Blue Water's policy of paying its cooks a day rate was consistent with a forty year industry-wide practice. As a practical matter, notwithstanding the remand, the Fifth Circuit's decision will enable the Labor Department to overturn that practice. The entire off-shore oil services industry will be affected. Indeed, it is likely that the Fifth Circuit's approach will affect the entire maritime industry, including ocean liners, cruise ships, and freighters that carry passengers to improve their profitability. All of these vessels ordinarily have cooks aboard, most of whom do more than 20 percent of their cooking for regular passengers.

The Fifth Circuit's ruling is without statutory, regulatory, or logical basis. For this reason, and in light of its consequences for the industry, the Fifth Circuit's rejection of the longstanding industry-wide practice deserves this Court's review.

The District Court found that Blue Water's cooks perform work essential to the operation of seagoing vessels traveling between Louisiana and the Outer Continental Shelf. It also found that while aboard these vessels "the cooks are subject to the authority, direction, and control of the master of the vessel." (*See*, p. 18a, *infra*). The Court of Appeals did not disagree with either finding. Under the Labor Department's own regulations, these findings should have resulted in a ruling that the cooks are seamen for purposes of the FLSA.

The FLSA does not define "seaman" for purposes of the Act. Labor Department regulations provide:

> . . . [A]n employee will ordinarily be regarded as "employed as a seaman" if he performs, . . . subject to the authority, direction and control of the master aboard a vessel, service which is rendered primarily

> as an aid in the operation of such vessel as a means of transportation, provided he performs no substantial amount of work of a different character.

29 C.F.R. § 783.31. The regulations (at 29 C.F.R. § 783.32) go on to state that "the term 'seaman' includes . . . cooks . . . if as is the usual case their service is of the type described in § 783.31."

Accordingly, under the Labor Department regulations, cooks are seamen if (1) they are subject to the authority, direction and control of the master aboard a vessel and (2) they perform service primarily as an aid in the operation of the vessel as a means of transportation, and no substantial amount of work of a different character. As noted, there is no question that the cooks at issue here meet the first requirement. Nor is there any doubt that the cooks perform service as an essential aid in the operation of the vessels as a means of transportation. The Court of Appeals, however, concluded that in order for the cooks' services to be *primarily* in aid of the operation of vessels as a means of transportation (and not, in substantial amount, of a different character) they must cook predominantly "for seamen." (*See* p. 12a, *infra*).

There is no statutory, regulatory, or logical basis for grafting this additional requirement onto the definition of "seaman." A vessel cannot operate as a "means of transportation" if the individuals being transported are not fed. This is true whether the individuals in question are other seamen, ordinary pasengers, or off-shore oil field maintenance workers. Thus, application of the seaman exemption to cooks should not turn on which categories of persons eat the food the cooks prepare. Rather, as the Court of Appeals stated (*see* p. 10a, *infra*) and the Labor Department regulations imply, the analysis should depend upon the "actual work performed." Indeed, the entire FLSA is "pervaded by the idea that what each employee actually does determines its application to him." *Walling*

v. W. D. Haden Co., 153 F.2d 196, 199 (5th Cir.), *cert. denied*, 328 U.S. 866 (1946). The actual work performed by Blue Water's cooks is the same regardless of who eats the meals.[4]

By focusing on the actual work performed, one can sensibly apply 29 C.F.R. § 783.31 and 32 without the need to count heads at meal time. Cooks who, "as in the usual case," primarily prepare basic meals providing sustenance for the people being transported are "seamen." Cooks who primarily provide specialized, non-essential culinary services, or who double as (for example) oil field maintenance workers, are not. The undisturbed findings of the District Court establish that Blue Water's cooks perform essential food services. Thus, the Court of Appeals erred in not finding them exempt.

The Court of Appeals ruling should be rejected on equitable grounds, as well. For forty years, the crews of offshore vessels, including the cooks, have been considered to be seamen by their employers and have been paid at day rates without formal overtime premiums. The Labor Department never challenged this practice, nor did it issue any regulation or interpretation that put the industry on notice that the status of the cooks depended on who consumed their meals.

Indeed, in past suits involving analogous situations, the Labor Department has not tried to recover overtime pay for cooks, but instead has sought overtime only for on-board staff that has used the vessel and its services

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[4] The Court of Appeals' approach, which defines cooks as seamen to the extent they cook for seamen, is flawed logically because it defines "seamen" by reference to the very term being defined. Thus, to perform the head count contemplated by the Appeals Court, one would have to ask whether other crew members are performing their services primarily for seamen. This exercise would, in turn, require determining whether the cooks themselves count as seamen, which is the very question under consideration. In short, the Court of Appeals' definition is circular.

in order to perform work wholly irrelevant to transportation. For example, *Marshall v. Woods Hole Oceanographic Industries*, 458 F.Supp. 709 (D. Mass. 1978), involved oceanographic research vessels whose only function was to sail to offshore locations and perform scientific research. The vessels were specifically designed for this purpose and had "no other practical functions or capabilities." 458 F.Supp. at 711. Labor sued to recover overtime pay for the scientific staff on the vessels, but not for the employees engaged in the operation of the vessels. Among the groups not included in the list of employees for whom overtime was sought was the cook. *Id.* at 715. The court's opinion does not suggest that the cook's status as a seaman depended on the extent to which his meals were consumed by the scientists. *See also Donovan v. Nekton, Inc.*, 703 F.2d 1148 (9th Cir. 1983) (Labor Department suit was limited to seeking overtime for marine technicians and electronic technicians abroad oceanographic, seismological, and geographic research vessels). In both cases, it appears that the scientific, nonseaman staff comprised more than 20 percent of the persons aboard ship.

The Fifth Circuit itself, in determining seaman status, has previously looked only to the type of work performed by crew members, not the identity of the individuals who benefittted from the work. In *Louviere v. Standard Dredging Corp.*, 239 F.2d 164 (5th Cir. 1956), the issue was whether the deckhand on a tug was a seaman. The deckhand did only the normal work of a deckhand on a vessel, just as the Blue Water cooks do only the normal work of cooks aboard ship. However, all of the tug's work—and thus all of the deckhand's work—went towards servicing the needs of a dredge which was engaged in "industrial" work rather than transportation. The court noted that the work of the dredge crew was not exempt seaman work. Yet, even though the deckhand's work was directed to meeting the needs of nonexempt industrial workers, the court held that he was a

seaman under the FLSA, since he himself did only deck-hand work, not industrial work. Under this logic, the Blue Water cooks are seamen, even if they primarily meet the needs of non-seaman, since they themselves do only crew-member work.

Fundamental fairness should prevent the infliction of significant damages on a small business through a novel and illogical construction of the seaman exemption. Blue Water simply followed a forty year, universal industry pay practice. Nothing in the Labor Department regulations, its past litigation posture, or the decisions of the courts suggested that this pay practice was unlawful. Accordingly, the Court should correct the Court of Appeals' error in interpreting the seaman exemption.

CONCLUSION

For the foregoing reasons, Petitioner requests that this petition for certiorari be granted.

Respectfully submitted,

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